STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY W. SIBLEY and WENDY KAY SIBLEY,

Plaintiffs-Appellants/Cross-Appellees,

v

RAY S. BAUERS doing business as R & R AUTO SALES, and TED ALKINS,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
July 16, 1999

No. 206883
Midland Circuit Court
LC No. 96-005481 CP

Before: Wilder, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the order of judgment which awarded plaintiff's $2,260.56 in attorney fees under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.;* MSA 19.418(1) *et seq.* On appeal, plaintiffs challenge the trial court's award of attorney fees as inadequate. Defendants cross-appeal, claiming that the trial court abused its discretion by improperly admitting expert testimony during the bench trial and thereafter relying on such testimony in support of its damage award in the amount of $4,531.13. We affirm the trial court's award of attorney fees, and conclude that no error occurred in the trial court's admission of or reliance upon the expert testimony.

Plaintiffs brought suit against defendants pursuant to the MCPA after they discovered that the minivan they purchased from defendants had previously been involved in a serious motor vehicle accident, totaled and then rebuilt with used parts. After the bench trial, the trial court found that defendants failed to disclose material facts regarding the condition of the minivan and awarded plaintiffs damages in the amount of $4,521.13. The trial court rejected plaintiffs' request for approximately $9,000 in attorney fees and, instead, awarded attorney fees in the amount of $2,260.56, essentially one-half the damage award.

Plaintiffs argue that the trial court abused its discretion when it used the low damage award as a ceiling on any potential attorney fee recovery. We review a trial court's determination of the reasonableness of an attorney fee for an abuse of discretion. *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 97; 537 NW2d 471 (1995). In this case, we find no such abuse.

The MCPA provides that a party who suffers a loss as a result of a violation of the act, may bring an action to recover actual damages, as well as reasonable attorney fees. MCL 445.911(2); MSA 19.418(11)(2); *Smolen v Dahlmann Apartments, Ltd*, 186 Mich App 292, 295; 463 NW2d 261 (1990). The trial court retains the authority to award a reasonable fee, regardless of the actual fee incurred by the plaintiff. *Head v Phillips Camper Sales & Rental, Inc*, ____ Mich App ____; ____ NW2d ____ (Docket No. 194444, issued 2/12/99), slip op., p 9. In determining a reasonable fee, the court must consider the special circumstances presented in a MCPA case as well as the factors set forth in *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973):

> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expense incurred; and (6) the nature and length of the professional relationship with the client. [*Head, supra* at slip op., pp 9-10.]

This Court noted in *Head, supra* at slip op., p 10, that the trial court is not limited to considering the *Crawley* factors and it may adjust an attorney's fee in light of the results of the proceedings. The trial court's award will be upheld unless it appears that the trial court's findings on the "reasonableness" issue was an abuse of discretion. *Smolen, supra* at 296.

Our review of the record confirms that the trial court took into account the appropriate factors, examined those factors in light of the facts of this case and concluded that $2,260.56 was a reasonable attorney fee award. The trial court noted that while plaintiffs' counsel spent a considerable amount of time on the case, the complexity of the case, or lack thereof, did not warrant the expenditure. The court also noted that the requested fee was excessive in light of the limited potential recovery and the recovery actually received. We find no abuse of discretion on this issue.

Plaintiffs next argue that they are entitled to an award of reasonable attorney fees for services rendered on their appeal. Under the circumstances of this case, we disagree. While the MCPA does not specifically provide for the awarding of appellate attorney fees, this Court has previously held that the act does allow for such recovery, and has granted an award for services rendered on appeal to the prevailing party. See *Smolen, supra* at 298; *Jordan, supra* at 99. However, in both *Smolen, supra*, and *Jordan, supra*, the prevailing party below also prevailed on appeal. While plaintiffs were the prevailing party below, they have not prevailed on their appeal. Since a party must prevail in order to be entitled to an award of attorney fees pursuant to the MCPA, we conclude that a party's fees should terminate at the point where they cease to prevail.

On cross-appeal, defendants argue that the trial court improperly admitted the testimony of plaintiffs' expert because the expert was not qualified and his opinion as to the value of the minivan in its post-repair state was based upon a fact not in evidence Although the issue of the expert's qualifications is unpreserved, we will review it since the qualification of an expert was a question for the court concerning which the necessary facts have been presented. *Kelley v E C Murray*, 176 Mich App 74, 79; 438 NW2d 882 (1989); *Poch v Anderson*, 229 Mich App 40, 52; 580 NW2d 456 (1998).

The parties do not dispute that expert testimony would have assisted the trial court in determining a fact in issue, i.e., the value of the minivan in its rebuilt condition. MRE 702. There are three prerequisites to the admission of expert testimony: (1) the witness must be an expert; (2) there must be facts in evidence which require or are subject to examination and analysis by a competent expert; and (3) there must be knowledge in a particular area which belongs more to an expert than to the common man. *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 215; 457 NW2d 42 (1990). A witness may be qualified as an expert by knowledge, skill, experience, training or education. MRE 702; *Mulholland v DEC Int'l Corp*, 432 Mich 395, 403; 443 NW2d 340 (1989). Here, the witness testified that he had owned and operated a business that sold new, used, and rebuilt vehicles for seventeen years. He further testified that he had been employed by an agency that essentially performed financing-related appraisals. Finally, the witness testified that he was once a certified automobile repair person and refinisher. We conclude that the witness' experience in the business and prior training as a repair person was sufficient to establish that he had the requisite expertise to render an opinion as to the value of the minivan. Moreover, the witness possessed specialized knowledge that would aid the fact finder, as the appraising of rebuilt vehicles is not within the knowledge of the general population. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 196-197; 555 NW2d 733 (1996). Accordingly, the witness was qualified to render an opinion regarding the value of the minivan.

Defendants also contend that the expert's testimony was inadmissible because the witness relied upon a fact not in evidence when forming his opinion as to the value of the vehicle. We disagree. Plaintiffs utilized a hypothetical question to elicit their expert's opinion. When an expert is examined with a hypothetical, the answer must be based on facts contained therein and the hypothetical question must be premised on facts already in evidence. *Grewe v Mt Clemens General Hosp*, 404 Mich 240, 257-258; 273 NW2d 429 (1978). When presented with the hypothetical question, the expert opined that the value of the minivan was approximately forty percent less than if the vehicle had not been rebuilt.

Defendants do not dispute that everything put forth in plaintiffs' hypothetical to the expert was a fact in evidence. Rather, defendants argue that the expert's opinion with regard to the value was based on a fact not in evidence, i.e., that plaintiffs' minivan was a "distressed vehicle" possessing a "branded" title. Pursuant to the Michigan Motor Vehicle Code, MCL 257.1 *et seq*.; MSA 9.1801(1) *et seq*., a motor vehicle becomes a "distressed vehicle" when the cost to repair the damaged vehicle is more than seventy-five percent of the pre-damage value. MCL 257.12a; MSA 9.1812(1). When an insurance company determines that a vehicle has become a "distressed vehicle," the insurance company must obtain a salvage or scrap title, i.e. a "branded" title in place of the original title pursuant to MCL 257.217c; MSA 9.1917(3). In this case, despite the damage to the vehicle, the minivan had its original title. Thus, defendants' contend that the expert's opinion was based upon a faulty premise.

After reviewing the witness's entire testimony, we do not find that the expert's opinion was based upon a fact not in evidence. The witness's opinion that the minivan was a "distressed vehicle" was based on industry standards. The expert clarified that he did not mean a "distressed vehicle" within the meaning of § 12a of the motor vehicle code (i.e., a vehicle with a branded title), but a "distressed vehicle" based on its condition per the understanding of that term in the industry.

A trial court has discretion to receive or reject an expert's opinion. *Friedman v Farmington Twp School Dist*, 40 Mich App 197, 205; 198 NW2d 785 (1972), citing *People v Zimmerman*, 385 Mich 417, 426; 189 NW2d 259 (1971). That the expert's opinion regarding value was tied to his own belief that the minivan was a "distressed vehicle" did not affect the admissibility of his opinion; rather, it went to the credibility and thus the weight to be accorded his opinion by the court. *People v England*, 176 Mich App 334, 340; 438 NW2d 908 (1989), aff'd sub nom *People v Perlos*, 436 Mich 305; 462 NW2d 310 (1990); *Attorney General v Ankersen*, 148 Mich App 524, 551; 385 NW2d 658 (1986). Since the expert's opinion with respect to value and "distress" was based on the hypothetical and the facts in the hypothetical were all in evidence, the trial court was free to accept the witness's opinion. Thus, the trial court did not abuse its discretion. *Mulholland*, *supra* at 402.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra